OPINION BELOW

A copy of the opinion of the district court is attached hereto as Appendix A, and a copy of its judgment and decree as Appendix B. A copy of the report and order of the Interstate Commerce Commission in *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541 (1964), is appended as Appendix C, and a copy of the Commission's unreported order denying reconsideration, as Appendix D.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to suspend, enjoin, annul, and set aside a report and two orders of the Interstate Commerce Commission. The judgment of the district court was entered on June 11, 1965, and notice of appeal was filed on July 1, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code.[1] The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *United States* v. *Drum*, 368 U.S. 370 (1962); *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy; Section 1, pars. (1), (1)(a), and (2)(a); Section 202, pars. (a), (b), and (c)(1); Section 203, pars. (a)(10), (13), (14), (15), and (b)(1)-(10); Section 204, pars (a)(1), (2), (3), and (4a); Sections 206 (a)(1), 216(b), 217(a), and 218(a) of the Interstate Commerce Act[2] are set forth verbatim in Appendix E hereto.

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[1] 28 U.S.C. §§ 1253 and 2101(b).

[2] 49 U.S.C. preceding § 1, and §§ 1(1), (1)(a), 2(a); 302 (a), (b), (c)(1); 303 (a)(10), (13), (14), (15), (b)(1)-(10); 304 (a)(1), (2), (3), (4a); 306(a)(1); 316(b); 317(a); 318(a).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission erred in holding that, for-hire motor transportation, within the confines of a single state, of property which has moved from, or will move to, points beyond the same state in private carriage, the entire movement being continuous, is not in interstate commerce subject to economic regulation under Part II of the Interstate Commerce Act?

2. Whether the district court, in affirming the orders and holding of the Commission, properly construed the law and correctly concluded that the Interstate Commerce Commission is without economic jurisdiction to regulate the for-hire carriage involved?

STATEMENT OF THE CASE

On January 15, 1962, South Paterson Trucking Co., Inc., filed a petition with the Commission asking for a declaratory order making definite and certain the application of Section 206(a)(1) of the Interstate Commerce Act when merchandise is transported into a state in proprietary carriage and is ultimately delivered to points in the same state by for-hire carriage, the entire movement being continuous. Underlying the petition was a difference of opinion that had developed between certain divisions of the Commission. In *Dora Motor Carrier Operations Within Arizona*, 49 M.C.C. 171(1948), *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313(1955), and *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581 (1957), division 1 and former division 5 had held that the described for-hire motor transportation was subject to economic regulation under the Act and required operating authority. But in *Holliday* v. *Liberty*, 53 M.C.C. 22(1951), and in *Iron and Steel, Central Territory*, 53 M.C.C. 769(1951), division 3 had held that similar for-hire transportation was not subject to regulation under

the Act, and that rates for such service did not have to be filed with the Commission.

By order dated May 21, 1962, the Commission instituted a rule-making proceeding, entitled Docket No. MC-C-3626, *Motor Transportation of Property Within A Single State*, to resolve this conflict between the divisions. The Commission invited motor, rail, and water carriers, and any other interested persons, to participate in the proceeding by submitting, for consideration, written statements of facts, views, and arguments. Thirty-seven such statements were filed with the Commission for its consideration, including statements by appellants.

On March 2, 1964, the Commission issued its decision wherein it found that for-hire transportation, within the confines of a single state, of property which has moved from, or will move to, points beyond the same state in private motor carriage, is, so far as the for-hire transportation is concerned, in intrastate commerce, and not in interstate commerce subject to economic regulation [3] under Part II of the Act. The Commission overruled those cases inconsistent with its finding. Four Commissioners dissented.[4]

Appellants, among others, pursuant to the Commission's General Rules of Practice, filed a petition for recon-

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[3] There are two broad fields of regulation under the Interstate Commerce Act—economic and safety. The so-called "regulated for-hire" motor carriers are subject to both economic and safety regulation, whereas private carriers, among others, are subject only to safety regulations, which cover qualifications and maximum hours of service of employees, and standards of equipment. The economic regulation of for-hire motor carriers embraces, to name only a few, such matters as (1) certificate requirements; (2) requirements of reports and prescription of a uniform system of accounts; (3) publication of rates and observance of rates; (4) requirement of insurance or surety bonds; and (5) requirement of Commission approval of certain consolidations and mergers. See, Taff, *Commercial Motor Transportation*, 514-517 (3rd ed. 1961).

[4] Appendix C, pp. 550-551.

sideration of the Commission's decision. By order dated August 5, 1964, the Commission denied all the petitions,[5] and its decision was administratively final.

The Pennsylvania Railroad Company filed a complaint on September 28, 1964, in the United States District Court for the Eastern District of Pennsylvania, alleging that the Commission incorrectly interpreted the law, and asked the court to set aside and annul the Commission's report and orders.

On October 6, 1964, appellants filed motions for leave to intervene in support of the position of the railroad. Shortly thereafter, Private Carrier Conference, Inc., South Paterson Trucking Co., Inc., National Industrial Traffic League, and the Pennsylvania Public Utility Commission filed motions for leave to intervene as defendants in support of the Commission. The district court granted all the motions and intervenors actively participated in the proceeding.

The district court handed down its decision on April 23, 1965. The court held that the report and orders of the Commission were in accordance with the applicable law, and it entered an order on June 11, 1965, dismissing plaintiffs' complaints.

THE QUESTIONS ARE SUBSTANTIAL

The issue in this proceeding is whether the Commission and the district court erred, as a matter of law, when they held, based upon *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.*, 298 U.S. 170 (1936), that the Commission lacks authority to subject to economic regulation the operations of for-hire motor carriers transporting traffic which has moved or will move in private carriage across a state line, the entire movement being continuous.

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[5] Appendix D.

1. Two questions of law are raised by the facts in this proceeding. First, is this continuous movement transportation which Congress has placed within the regulatory authority of the Interstate Commerce Commission by virtue of the Motor Carrier Act, 1935,[6] which became Part II of the Interstate Commerce Act in 1940?[7] And, second, if so, what is the extent of the regulatory authority?

The answer to the first question turns on the meaning of Section 202(a) which generally defines the scope of Part II. It reads:

> The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission.

Section 203 (a) (10) amplifies Section 202(a) by defining interstate commerce:

> The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

In turn motor vehicle is defined in Section 203(a) (13) as "any vehicle . . . propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property . . . ."

It is clear from the foregoing that a private carrier transporting his freight by motor vehicle from a place in one state to a place in another is engaged in interstate commerce as defined in Section 203(a) (10), and that he is subject to the regulatory authority of the Commission.

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[6] 49 Stat. 543, 49 U.S.C. §§ 301-328.

[7] 54 Stat. 919.

As to the for-hire segment of the involved movement, there can be no doubt either that this carrier is also engaged in interstate commerce as defined in that section, even though his portion of the movement is confined to transportation within a single state. This is so because the Commission has assumed for the purposes of this case that the shipper moves his freight across a state line, that he has a specific destination in another state in mind, and that the entire movement is continuous. And it is well settled that transportation performed by a for-hire carrier wholly within one state is transportation in interstate commerce if "the fixed and persisting intent of the shipper at the time of the shipment" is to move his property from an origin in one state to an ultimate destination in another, and if the transportation wholly within one state is part of a continuous movement carrying out that intent.[8]

Having shown that Section 202(a) gives the Commission authority to regulate the private and for-hire transportation, we turn next to the extent of that regulatory authority. Congress has given the Commission no authority to regulate economically the operations of private carriers; the Commission's authority respecting them is limited by Section 204(a)(3) to matters concerning safety. On the other hand, Sections 203(a)(14) and 203(a)(15) define two types of for-hire motor carriers, common and contract, as being subject to the Commission's regulatory authority. Section 204 provides that: "(a) It shall be the duty of the Commission—(1) To regulate common carriers by motor vehicle as provided in this part . . .," and "(2) To regulate contract carriers by motor vehicle as provided in this part . . . ." And the regu-

[8] *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U.S. 257 (1927); *Baltimore & Ohio S. W. R. Co.* v. *Settle*, 260 U.S. 166 (1922); *United States* v. *Majure*, 162 F. Supp. 594 (1957); *Petroleum Products Transported Within A Single State*, 71 M.C.C. 17 (1957).

lation "provided in this part" is of two categories—safety regulation and economic regulation.

The Commission's duty respecting safety regulation of for-hire carriers is discretionary in that Section 204(a)(1) provides that it "may" establish reasonable requirements as to qualifications and maximum hours of service of employees and safety of operation of equipment. Its duty, however, regarding economic regulation is not discretionary. Thus, Section 206(a)(1) provides that "no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway . . . unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations." Section 216(b) provides that every common carrier of property by motor vehicle is required "to establish, observe, and enforce just and reasonable rates, charges, and classifications . . . ." Section 217(a), which deals with the publication of tariffs provides that "Every common carrier by motor vehicle shall file with the Commission . . . tariffs showing all the rates, fares, and charges for transportation. . . ." And Section 218(a) makes it "the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges . . ." and "to file with the Commission . . . schedules concerning the actual rate or charges . . . ."

Only in four instances did Congress give the Commission discretion to determine whether or not to regulate economically for-hire motor carriers subject to the provisions of Section 202(a). Those instances are where the carriers' operations are "wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality, except when such transportation is under common control, management, or arrangement for a continuous

carriage to or from a point without such municipality, municipalities, or zone . . .";[9] where the transportation is casual, occasional, or reciprocal transportation by any person not engaged in transportation by motor vehicle as a regular occupation or business;[10] where the carrier is engaged in "the emergency transportation of any accidentally wrecked or disabled motor vehicle in interstate or foreign commerce by towing";[11] and where the carrier's operations are within a single state and are of such a nature as not to affect the Commission's regulation of transportation by motor carriers engaged in interstate commerce.[12] In all other instances, the Congress itself determined whether carriers subject to the provisions of Part II by virtue of Section 202 (a) were to be exempt or not from economic regulation. Congress carefully spelled out the exemptions in Sections 202(c) (1) and (2) and 203(b), pars. (1)-(7a). And nothing in those sections or in any other section of the Act suggests, much less provides, an exemption from economic regulation for for-hire carriers performing transportation in interstate commerce, wholly within the confines of a single state, because that transportation is one part of a continuous movement, the other part of which is performed by a private carrier.

Support for the Commission's authority to regulate economically the single-state, for-hire motor carriage involved can also be found in other provisions of Part II. For example, Section 206 (a) (1) requires motor carriers operating in interstate commerce within the confines of a single state to have a certificate from the Commission authorizing such operations. The rate sections of Part II

[9] Section 203(b)(8).

[10] Section 203(b)(9).

[11] Section 203(b)(10).

[12] Section 204(a)(4a).

apply to for-hire carriers operating in interstate commerce whether they are single-state operators or operate from coast to coast. And Section 204(a)(4a), as we just indicated, empowers the Commission to exempt from its economic regulation single-state carriers whose operations are not an important segment of interstate commerce. Thus, there can be no doubt that Congress meant single-state, for-hire carriers engaging in interstate commerce to be subject to the economic jurisdiction of the Commission. It is clear, too, that it is the interstate character of the overall commerce, not the physical operations of the for-hire carrier, that determines whether such transportation is subject to such regulation.

Since Congress expressly exempted transportation from the Commission's economic regulation when it deemed an exemption advisable, and since there is no exemption dealing with the involved for-hire carriage, it follows logically that Congress meant the Commission to have economic jurisdiction over such for-hire transportation. We submit, therefore, that the for-hire transportation here is "transportation . . . by motor carriers engaged in interstate commerce" as that commerce is defined in Section 203(a)(10); that Section 202(a) vests jurisdiction to regulate this transportation in the Interstate Commerce Commission; and that such jurisdiction includes authority to regulate it economically as provided in Part II.

2. The basis for the Commission's conclusion that the for-hire motor transportation under consideration is not in interstate commerce subject to its economic regulation is *Pennsylvania R. Co.* v. *Ohio Public Utilities Comm.*, *supra*, which case it considered controlling:

> The *Pennsylvania* case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to eco-

> nomic regulation under the provisions of what is now part I of the act. The fundamental principles of the *Pennsylvania* case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate commerce.[13]

And the district court, in affirming the Commission's report and order, agreed with it that the *Pennsylvania* case was controlling. It stated:

> The Supreme Court held that Congress had not granted to the Commission jurisdiction to regulate the rates then in issue. In *Pennsylvania R. R. Co., supra*, the Court was considering Part I of the Interstate Commerce Act (49 U.S.C. §§ 1-26) and in the instant matter we are construing Part II of the Interstate Commerce Act (49 U.S.C. §§ 301-327). Nevertheless we feel, as did the Commission below [footnote omitted], that the logic of *Pennsylvania R. R. Co., supra*, is equally applicable to Part II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below.[14]

The pivotal point of this appeal is, therefore, the correctness of the application of the *Pennsylvania* case by the Commission and the district court. In that case, a coal producer used its own barges and tugs to transport its

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[13] Appendix C, p. 550.

[14] Appendix A, p. 3.

coal from a mine in Pennsylvania to another Pennsylvania point, thence over its own railroad right-of-way to its plant in Ohio where the coal was washed, broken, assorted, and, for the first time, made ready to fill specific orders. The coal was thereafter loaded on a common carrier railroad for delivery to points in Ohio. The controversy which arose from these facts was whether certain interstate charges on file with the Commission, under what is now Part I of the Act, applied to a portion of the coal movement by the common carrier railroad in Ohio. The Court held that the Act did not apply to the movement of the coal wholly within Ohio because it was not "that particular form of interstate commerce which Congress had subjected to regulation in respect of rates by a federal commission." It stated the matter this way:

> *The question for us here is not whether the movement of the coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. The Interstate Commerce Act . . . is aimed at common carriers exclusively (section 1(1,3), 49 U.S.C.A. § 1(1,3)), and not even at all these . . . .* Even though the activities are those of common carriers by rail, the statute does not apply "to the transportation of passengers or property . . . wholly within one State and not shipped to or from a foreign country from or to any place in the United States. (Emphasis supplied.)
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> * * * *
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> The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown.[15]

The *Pennsylvania* case differs from the one at hand in one major respect: the Court's decision in that case

[15] 298 U.S. at 174-175.

was based upon a jurisdictional question arising under Sections 1 (1) (a) and (2) (a) of Part I of the Interstate Commerce Act, whereas this proceeding involves a jurisdictional question under Sections 202 (a) and (b) of Part II.

Section 1 (1) of Part I provides:

> That the provisions of this part shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad . . . .
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> * * * *
>
> —from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

It is readily apparent that Section 1 (1) does not make Part I applicable to all transportation by railroads engaged in interstate commerce. It is applicable only to transportation from one state to another physically performed by railroads that are common carriers. And to make this doubly plain, Section 1 (2) specifically provides that Part I "shall not apply—(a) To the transportation of passengers or property . . . wholly within one State . . ." unless such transportation is in foreign commerce. Accordingly, the Court held in the *Pennsylvania* case that the for-hire transportation by the railroad wholly within Ohio was not subject to economic regulation under Part I.

The for-hire transportation in this proceeding, however, is by a motor carrier, not a common carrier railroad, and

is subject to Section 202(a) which reflects a more comprehensive exercise of Congressional power to regulate interstate commerce than Congress evidenced by Section 1 (1)(a). Indeed, the Commission has held that by Section 202(a) the Congress exercised all of the power the commerce clause of the Constitution gives it. *Petroleum Transportation Within A Single State, supra,* 71 M.C.C. at 31. We pointed out previously that under Section 202 (a), *all* for-hire motor carriers engaged in interstate commerce, whether between points in different states or within the borders of a single state, are subject to the Commission's economic jurisdiction, unless expressly exempted from such regulation. And since there is no express exemption covering the instant for-hire transportation, it must be subject to the Commission's economic regulatory authority.

The Commission states in its report that the *Pennsylvania* case "made it clear. . . . that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation;[16] and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act." The Commission then goes on to state that the fundamental principles of the *Pennsylvania* case are not altered in dealing with Part II, and that therefore "the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier."[17]

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[16] The Commission's statement should be contrasted with its position in *Air Dispatch, Inc.* v. *United States,* 237 F. Supp. 450 (1964). In that case the Commission vigorously (and successfully) defended its authority to regulate economically motor transportation that is a part of, but not incidental to, transportation by aircraft, notwithstanding that the former be performed within a single state and that the Commission has no authority whatever over the air segment of the movement. Substituting private motor carriage for the air carriage, we submit the situation presented here is essentially no different from what was before the court in the *Air Dispatch* case.

[17] Appendix C, p. 550.

The Commission is in error for two reasons. First, this Court did not establish any fundamental principles in the *Pennsylvania* case; it construed specific provisions of the Interstate Commerce Act. Secondly, the Court did not hold that no transportation in interstate commerce began until the property was placed in the possession of a carrier subject to economic regulation. Rather, it held that the portion of the transportation in interstate commerce which was performed by the for-hire carrier was not subject to regulation under Part I because Section 1(1) of that Part excluded from regulation all transportation in interstate commerce, except transportation from one state to another physically performed by railroads that are common carriers.

Plainly, the Commission and the district court have misapplied and misconstrued the *Pennsylvania* case in this proceeding and, contrary to their holdings, that case is not controlling. It is also plain that the involved for-hire transportation is subject to economic regulation by the Commission, and that the Commission and the district court erred, as a matter of law, in concluding otherwise.

3. In its report the Commission concludes that the single-state, for-hire transportation in question is intrastate commerce rather than interstate commerce "only in respect of economic regulation," but that there may be situations where the otherwise separate private movement across the state line and the for-hire intrastate movement may be combined in order to establish federal jurisdiction over the whole for purposes unrelated to economic control. It said:

> Although the instituting order herein states that the purpose of this proceeding is to determine if the involved for-hire transportation is interstate commerce subject to the Interstate Commerce Act, or if it is intrastate, we wish to emphasize that we have answered the first proposition in the negative and the

> second in the affirmative only in respect of economic regulation. It should be noted, however, that even though we think that the *Pennsylvania* decision does not permit the combination of for-hire transportation wholly within a single State with carriage by an owner across a State line for the purpose of subjecting the former to Federal economic regulation, there may in fact be situations where Congress has intended that the otherwise separate private interstate movement and the for-hire intrastate movement be combined in order to establish Federal jurisdiction over the whole for purposes unrelated to economic regulation. For example, compare *Walling* v. *Material Wholesale Food & Supply Co.*, 141 F. 2d 331, 337, 340 and *Feinman* v. *Philip Fleisher, Inc.*, 51 N.Y.S. 2d 31, which held to be subject to our jurisdiction under part II certain matters relative to the employment of drivers of private motor carriers operating within a single State in the transportation of traffic moving to or from such State in motor common carriage.[18]

Stated differently, the Commission has established a category of for-hire motor carriers whose operations are in intrastate commerce for purposes of economic regulation, yet may be in interstate commerce for other purposes, e.g., safety regulation.

We agree with the Commission that it has safety jurisdiction, under the fact situation presented here, over the private carrier operations which start the through movement of the goods, because those operations cross state lines, and that it has safety jurisdiction over the for-hire leg of the transportation which completes the interstate movement. But in order for the Commission to have safety jurisdiction over the for-hire leg of the through movement, that transportation must be in interstate commerce. The Commission, while admitting this, says, in

[18] *Id.*, pp. 550-551.

effect, that for purposes of safety regulation, the transportation involved must be viewed as one continuous movement (which it certainly is), but that for purposes of economic regulation the same transportation must be compartmentalized into two separate segments, i.e., one movement in private carriage, and one in for-hire carriage.

Aside from the obvious lack of logic in the Commission's reasoning, there is no support whatever in the language of the statute or its legislative history [19] for its position. Part II of the Interstate Commerce Act does not define transportation as being in interstate commerce for certain purposes and in intrastate commerce for other purposes. Section 202(a), as noted earlier, provides that, "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission." It follows that if, as the Commission claims, the for-hire motor transportation is "not interstate transportation," or is "not in interstate commerce subject to economic regulation under part II," it is not subject to the Commission's authority to regulate safety of operations. In short, the involved for-hire transportation is either in interstate commerce for all purposes of the Act, or it is in intrastate commerce and subject to no provisions of the Act. The Commission cannot read Section 202(a) as conferring jurisdiction that it wants and as withholding jurisdiction that it does not want. The Commission's attempt to do so in this proceeding points up the inconsistency of its position and the fundamental error of its report.

4. Congress, by the Motor Carrier Act, 1935, preempted the regulation of for-hire motor carriers engaged

[19] In fact, there is no legislative history at all dealing with the precise fact situation presented here.

in transporting freight in interstate commerce. In fact, the only portion of the entire motor carrier field which Congress did not occupy is described in Section 202(b) and deals with intrastate transportation by for-hire motor carriers engaged exclusively in intrastate commerce, the regulation of such carriers being expressly delegated to the states.

In addition to the provisions of Section 202(b), statutory support for the view that the states are without power to regulate for-hire motor carriers operating in interstate commerce[20] is found in three sections of the Act which we have discussed previously: Section 202(a), which authorizes the Commission to regulate all for-hire motor carriers engaged in interstate commerce; Section 206(a)(1), which expressly requires single-state, for-hire motor carriers to obtain operating authority before performing such transportation; and Section 204(a)(4a), which authorizes the Commission to exempt from federal regulation motor carrier operations in interstate commerce which are confined to a single state provided they are "of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate commerce . . . ." The latter section shows clearly the intent of Congress to regulate exclusively single-state, for-hire motor carriers engaged in interstate commerce. For Section 204(a)(4a) provides further that where such an exemption is granted, "it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption." Thus, the states are without

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[20] Except for the limited delegation in § 206(a)(6), enacted in 1962, 79 Stat. 911, empowering the states to issue certificates which may be registered with the Commission for single-state interstate transportation. Even this limited state power, however, is subject to Commission veto under specified circumstances.

authority to regulate economically single-state, for-hire carriers, unless the federal government first withdraws from the field and delegates its power over such transportation to the states.

The doctrine that the states have no power to regulate economically for-hire motor carriers engaged in interstate commerce has been confirmed by the courts. In *Castle* v. *Hayes Freight Lines*, 348 U.S. 61(1954), Mr. Justice Black stated:

> Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. The federal plan of control was so all-embracing that former power of states over interstate motor carriers was greatly reduced. No power at all was left in states to determine what carriers could or could not operate in interstate commerce. Exclusive power of the Federal Government to make this determination is shown by § 306 of 49 U.S.C., 49 U.S.C.A. § 306 which describes the conditions under which the Interstate Commerce Commission can issue certificates of convenience and necessity.[21]

And the *Hayes* case was recently quoted by the district court in *Daniels* v. *United States*, 210 F. Supp. 942 (1962).[22] It said (pp. 950-951):

> As the Supreme Court said in *Castle* v. *Hayes Freight Lines, supra*, under the Motor Carrier Act of 1935 the federal plan of control over carriers engaged in interstate commerce was all embracing, including exclusive power in the federal government to determine what carriers could or could not engage in interstate commerce.

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[21] 348 U.S. at 63.

[22] Aff'd. *per curiam*, 372 U.S. 704(1963); compare also *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77(1958).

Another case in point is *State Corporation Commission* v. *Bartlett & Co. Grain*, 338 F. 2d 495(1964).[23] There grain was purchased by Bartlett at points in Kansas and transported by common, contract, and private motor carriers to its grain elevator at Kansas City, Kansas, where it was processed for resale to customers located outside of Kansas. While the grain company might have outstanding contracts for grain of certain grade or quality, no grain was purchased to fill any particular contract. Kansas attempted to assert its jurisdiction over the rates charged by the for-hire motor carriers carrying the grain to the elevator on the ground that the transportation was intrastate commerce. The trial court held that Congress by the Interstate Commerce Act exercised complete jurisdiction over such transportation, and no control of rates remained in the state regulatory system. The court of appeals affirmed the lower court's decision, holding that because the fixed and continuing intent of the terminal operator was to ship all the grain received at its terminal in interstate commerce, the short stopover at the elevator did not change the interstate character of the transportation. Noting that the transportation of the grain was exempt from economic regulation by the Commission under Section 203(b), the court concluded nevertheless that "the federal government by the Motor Carrier Act has preempted the regulation of the carriers here concerned, and the exception from regulation is to prevail as against the attempt made here by the state of Kansas to regulate the carriers hauling unprocessed grains."[24] Hence the rates were not subject to regulation by Kansas, even though the transportation involved was specifically exempted from federal economic regulation by the Act.

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[23] *Cert. denied*, 85 S. Ct. 1109(1965).

[24] 338 F. 2d at 499.

The Commission's finding that the for-hire transportation at issue is *not* in interstate commerce subject to economic regulation under Part II of the Act,[25] may well mean that such for-hire motor transportation will not be subject to any economic regulation whatsoever. This is because the states have no power to regulate for-hire motor carriers handling freight moving in interstate commerce since Congress has preempted this motor carriage by its passage of the Motor Carrier Act, 1935. The Commission's decision, therefore, may well result in a hiatus in the regulatory scheme by freeing from all economic regulation an important segment of the motor carrier industry. It is the prospect of this regulatory void that concerns these appellants.

The practical effect of the Commission's decision is that it will forfeit all control over the rates of single-state, for-hire movements under arrangements such as those involved here because Section 216(e) of the Act provides that the Commission shall have no power "to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever." Shippers who might otherwise use the services of regulated interstate motor carriers from plant site to destination would be encouraged to transport their freight to a point just within the boundary of the state to which the freight is destined for the exclusive purpose of avoiding both state and Commission control. There will be resort to all manner of devices and changes in form of operating practices by single-state motor carriers to escape regulation.

The federally regulated for-hire motor carriers have a statutory obligation under the Interstate Commerce Act to provide the day-to-day transportation service required

[25] Appendix C, pp. 550-551.

by the general shipping public. To meet this obligation, the carriers must have their equipment and personnel ready to meet any shipper's reasonable request for transportation, and their facilities must be available during periods of slack as well as peak demands for service. It is an expensive proposition for the owners of motor vehicles, many of whom operate on slim margins of profit, to meet their continuing responsibility to the shipping public, and any loss of traffic impairs their ability to do so. Accordingly, these appellants are vitally concerned with the issues in this proceeding. The Commission is, in effect, creating a class of motor carriers free of entry control and without any obligation to the public, who will be in a position to divert freight from the regulated carriers.

Besides the loss of traffic, these appellants are alarmed by the effect the Commission's decision will have in the field of safety. The Commission's finding that the for-hire transportation is in intrastate commerce, for economic purposes, raises serious questions as to its power to regulate such transportation for purposes of safety. As we pointed out before, transportation is either in interstate commerce for all purposes of the Act, or it is in intrastate commerce and subject to no provisions of the Act. If the Commission is correct that it lacks authority to regulate economically the for-hire carriage here involved because it is in intrastate commerce, then it logically follows that it also lacks authority to regulate such transportation respecting safety. There are certain to be conflicts between the Commission and the states as to their respective safety jurisdiction, and between the Commission and the Wage-Hour Division of the Department of Labor [26] re-

[26] Section 213 (1) of the Fair Labor Standards Act, 29 U.S.C. § 213 (b)(1), exempts from the overtime provisions of that law "any employee with respect to whom the Interstate Commerce Commission has qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49." See also, *United*

garding jurisdiction over employees of single-state truck operators. The shipping public, in turn, will ultimately pay the penalty resulting from such conflicts in the form of duplicative regulation.

Congress's national transportation policy is to provide for the "fair and impartial regulation of all modes of transportation . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . .— all to the end of developing, coordinating, and preserving a national transportation system . . . adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense." We submit that the Commission's decision undermines that policy.

States v. *American Trucking Ass'ns*, 310 U.S. 534(1940); *Dallum* v. *Farmers Co-op Trucking Ass'n*, 46 F. Supp. 785(1942).

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the district court be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 30th day of August, 1965, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530; to Robert B. Hummel, Esq., Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D.C. 20530; and to Drew J. T. O'Keefe, Esq., United States Attorney, Eastern District of Pennsylvania, Philadelphia, Pennsylvania.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and I. K. Hay, Esq., Deputy General Counsel, at the Offices of the Commission, Washington, D. C. 20423.

3. On The Pennsylvania Railroad Company, by mailing copies in duly addressed envelopes, with postage prepaid, to Carl Helmetag, Esq., Assistant General Counsel, and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia 4, Pa.

4. On South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph E. Keller, Esq., and William H. Borghesani, Jr., Esq., 1712 N Street, N. W., Washington, D. C. 20036.

5. On The National Industrial Traffic League, by mailing copies in duly addressed envelopes, with postage prepaid, to John F. Donelan, Esq., and William L. Slover, Esq., 888 - 17th Street, N. W., Washington, D. C.

6. On the Pennsylvania Public Utility Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph C. Bruno, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvania

PETER T. BEARDSLEY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 36561

THE PENNSYLVANIA RAILROAD COMPANY

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Appeal From A Report and Order of the
Interstate Commerce Commission

Argued February 25, 1965

Before Freedman, Circuit Judge and
Kraft and Higginbotham, District Judges

OPINION OF THE COURT

(Filed April 23, 1965)

Per Curiam.

We are here asked to hold that the Interstate Commerce Commission must extend its economic regulation into certain areas pertaining to ". . . for hire motor transportation within the confines of a single state" [1]—even though

[1] Motor Transportation of Property Within A Single State, 94 MCC 541, 542 (1964). These proceedings were originally instituted

the Commission (by a majority)[2] has held that there is no statutory jurisdiction for the economic regulation of the type requested by petitioners. Little can be added to the careful analysis of the Commission's opinion, which notes the past dichotomies and conflicts between various divisions within the Commission, and the historical and statutory basis for its present legal conclusions.

Almost three decades ago in *Pa. R. R. Co.* v. *Public Utilities Commission*, 298 U.S. 170, 174 (1936), 56 S. Ct. 687, 688-89, Justice Cardozo spoke with clarity when noting that:

> "The question for us here is not whether the movement . . . is to be classified as commerce or even as commerce between states. *The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation* in respect of rates by a federal commission." (Emphasis added.)

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by an Order of May 21, 1962, of the Interstate Commerce Commission noting that it desired to issue an "interpretive ruling" because there was ". . . a difference of opinion between divisions of the Commission as to whether transportation by for-hire motor carriers of property within a state of goods which have moved or will move to or from points outside the state by private motor carriers, the entire movement being continuous, is interstate commerce subject to the Interstate Commerce Act or whether it is intrastate transportation." The Commission further noted that on January 15, 1962, the South Paterson Trucking Co., Inc., of Paterson, New Jersey, had filed a petition seeking a declaratory order making ". . . definite and certain the application of Section 206(a) of the Act when merchandise is transported into a state in proprietary (private) carriage and is ultimately delivered to points in the same state by a for hire-carrier; and that it is desirable that the matter be considered and resolved by the Commission by the issuance of an interpretive ruling; . . ." Pursuant to the May 21, 1962 Order, thirty-seven statements were filed with the Commission noting the views of various interested rail and motor carriers, manufacturers, motor carrier associations, associations of manufacturers, state regulating commissions and other persons. After receipt of these briefs and statements, the Commission issued its opinion on March 2, 1964, MC-C3626, reported at 94 MCC 541 (1964).

[2] Four of the eleven Commissioners dissented.

The Supreme Court held that Congress had not granted to the Commission jurisdiction to regulate the rates then in issue. In *Pennsylvania R. R. Co., supra*, the Court was considering Part I of the Interstate Commerce Act (49 U.S.C. §§ 1-26) and in the instant matter we are construing Part II of the Interstate Commerce Act (49 U.S.C. §§ 301-327). Nevertheless we feel, as did the Commission below,[3] that the logic of *Pennsylvania R. R. Co., supra*, is equally applicable to Part II, and that there are no sufficiently significant statutory differences to warrant a different result. Thus we affirm the order and holding of the Commission below.

BY THE COURT:

/s/ Abraham L. Freedman
ABRAHAM L. FREEDMAN, Circuit Judge

/s/ C. William Kraft, Jr.
C. WILLIAM KRAFT, JR., District Judge

/s/ A. Leon Higginbotham, Jr.
A LEON HIGGINBOTHAM, JR., District Judge

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[3] In discussing the Pennsylvania case, supra, the Commission said: "The Pennsylvania case made it clear that not all commerce is transportation; that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation; and that a shipper is not a carrier subject to economic regulation under the provisions of what is now part I of the act. The fundamental principles of the Pennsylvania case are not altered in dealing with part II instead of part I. For although part II extends to proprietary operations for the purposes of regulating safety of operations and hours of service, it does not consider shippers to be subject to the act for the purposes of economic regulation. Thus under part II, just as under part I, the transportation must be considered as beginning at the point where the shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation." (94 MCC at 550.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 36561

THE PENNSYLVANIA RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

FINAL JUDGMENT AND DECREE

The above-entitled action having come on for hearing on the merits on February 25, 1965, before a duly constituted district court of three judges convened pursuant to sections 2284 and 2325 of Title 28, United States Code, and the Court having considered the pleadings, the briefs, and the oral arguments of counsel, and having also considered the certified copy of the record made before the Interstate Commerce Commission in the proceeding under review, and being fully advised in the premises, and the Court having filed its opinion on April 23, 1965, in which it held valid and sustained the orders entered by the Commission on March 2, 1964, and August 5, 1964, in Docket No. MC-C-3626, *Motor Transportation of Property Within a Single State*, 94 M.C.C. 541, it is hereby

ORDERED, ADJUDGED AND DECREED that the relief prayed for in the complaint be, and it is hereby, denied and the complaint is dismissed, the plaintiffs to pay the costs.

Dated this 11th day of June, 1965.

ABRAHAM L. FREEDMAN
United States Circuit Judge

APPROVED:

C. WILLIAM KRAFT, JR.
United States District Judge

CARL HELMETAG, JR.
Attorney for Pennsylvania Railroad Co., Plaintiff

A. LEON HIGGINBOTHAM, JR.
United States District Judge

RALPH C. BUSSER, JR.
Attorney for American Trucking Associations, Inc. and National Motor Freight Traffic Association, Inc., Intervening Plaintiffs

V. BAKER SMITH
Attorney for Private Carrier Conference, Inc. of American Trucking Associations, Inc. and South Paterson Trucking Company, Inc., Intervening Defendants

Asst. United States Attorney

JOHN H. D. WIGGER
Attorneys for United States of America, Defendant

THOMAS F. MOUNT
Attorney for the National Industrial Traffic League, Intervening Defendants

I. K. HAY
Attorney for Interstate Commerce Commission, Defendant

WILLIAM A. GOICHMAN
Attorney for Pennsylvania Public Utility Commission, Intervening Defendant

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-C-3626

MOTOR TRANSPORTATION OF PROPERTY WITHIN A SINGLE STATE

Decided March 2, 1964

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1. For-hire motor transportation within a single State of property, which has moved or will move in private motor carriage from or to points beyond the single State, found not to be transportation in interstate commerce subject to economic regulation under part II of the Interstate Commerce Act.

2. *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581, *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313, *Dora Motor Carrier Operations Within Arizona*, 48 M.C.C. 171, *Bisceglia Contract Carrier Application*, 34 M.C.C. 233, and *Roethlisberger Transfer Co. Ext.—Frankenmuth, Mich.*, 32 M.C.C. 709, and other cases of similar import, to the extent inconsistent with the discussion herein, overruled.

William M. Bennett, Mary M. Pajalich, and *Donald B. Day* for the Public Utilities Commission of the State of California.

John G. Feehan for the Maine Public Utilities Commission.

Tyre W. Burton, Chairman, *E. L. McClintock*, *William Barton*, *Frank J. Iuen*, and *Frank W. May*, Commissioners, for the Missouri Public Service Commission.

George J. Griffin for the Public Utilities Commission of the State of Connecticut.

John Block, Jr., Chairman, *G. Y. Fails*, and *Ingram B. Pickett*, Commissioners, and *L. C. Cypert* for the State Corporation Commission of New Mexico.

Kent H. Brown for the New York State Public Service Commission.

T. G. Killian for the North Carolina Utilities Commission.

William C. Seibert for the State Corporation Commission, Commonwealth of Virginia.

W. E. Aebischer, *Lelland M. Cowan*, *J. F. Edell*, *Roy L. Eyster*, *W. R. Fleming*, *R. E. Gifford*, *Carl Helmetag, Jr.*, *Paul H. Johansen*, *Al Kochka, Jr.*, *Carll V. Kretsinger*, *Tom B. Kretsinger*, *L. M. Lewis*, *Hugh T. Matthews*, *Harry McChesney, Jr.*, *M. L. Owens*, *R. Y. Schureman*, *John Harmon Vickers*, *C. E. Walker*, *John Scala*, *John M. Zachara*, *Peter T. Beardsley*, *William J. O'Brien, Jr.*, *W. H. Borghesani, Jr.*, *Joseph E. Keller*, *Harry C. Maxwell*, *Frederick A. Babson, Jr.*, *John C. White*, *William A. Quinlan*, *C. A. Pascarella*, *Charles A. Washer*, *John F. Donelan*, *Dickson R. Loos*, *John M. Cleary*, *Austin L. Roberts*, *Paul V. Miller*, *J. M. Collins*, *Angus M. Holmes*, *Jerome Hewitt*, and *D. E. Burnham* for various carriers, persons, and associations filing representations.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding was instituted by order of May 21, 1962, for the purpose of determining if for-hire motor transportation, within the confines of a single State, of

property which has moved from, or will move to, points beyond the same State in private carriage, the entire movement being continuous, is, so far as the for-hire transportation is concerned, interstate commerce subject to the Interstate Commerce Act, including those sections thereof applicable to the economic regulation of motor carriers engaged in for-hire transportation in interstate commerce; or if the for-hire motor carriage is a movement in intrastate commerce. Underlying the institution of this proceeding is a difference of opinion that has developed between divisions of this Commission with respect to the question presented; division 1 and former division 5 concluding that the for-hire portion of the type of movement generally described above may, if the facts so warrant, be in interstate commerce within the meaning of part II of the act and subject to the operating rights provisions thereof, and division 2 concluding in proceedings before it that such for-hire transportation is not in interstate commerce within the meaning of part II and is not subject to the rate provisions of that part. In our order of May 21, 1962, we noted that a petition had been filed by South Paterson Trucking Co., Inc., seeking a declaratory order with respect to its for-hire motor carrier operations within the State of New Jersey when preceded by a movement in private carriage from a point outside New Jersey. Our order provided for participation by interested persons through the submission of written statements of their facts, views, and arguments. Thirty-seven such statements have been received, accounting for the participation of 46 interested rail and motor carriers, manufacturers, motor carrier associations and associations of manufacturers, State regulatory Commissions, and other persons,[1]

[1] *Motor carriers:* South Paterson Trucking Co., Inc., Blue & Gray Transportation Co., Inc., Be-Mac Transport Co., Inc., Hess Cartage Company, Butler-Newark Daily Delivery, Inc., J. L. Cox & Son, Inc., Parkhill Truck Company, J. O. (Red) Willett Pipe Line Stringing Corporation, Dunn Bros., Inc., Ecklar-Moore Express, Inc., Arnold Lignon Truck Lines, Inc., McDuffee Motor Freight, Inc., Cumber-

all of whom and which shall hereinafter be called by appropriate short titles.

FACTUAL SITUATION

Although not all of the statements filed describe completely the facts to which they allude, the majority of the representations dealing factually with the situation described in the instituting order herein present a basic picture of the circumstances which do or may prevail in the performance of the transportation under consideration. This transportation consists generally of small shipments consolidated into truckload quantities by a shipper for proprietary movement to a terminal or other facility of a for-hire motor carrier for sorting and distribution by the latter throughout a single State. The merchandise is sometimes distributed without delay, and at other times is held and integrated into a carrier's distribution schedule. Bills of lading are issued to the shipper (through the driver of the proprietary motor vehicle) at the point the freight is tendered to the for-hire carrier for distribu-

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land Motor Freight, Inc., Sutton Transfer, Inc., Roadway Express, Inc., Campbell's Service, National Trailer Convoy, Inc., and Dixie Ohio Express, Inc.

Motor carrier associations: Joint Northeastern Motor Carrier Association, Inc., National Motor Freight Traffic Association, Inc., American Trucking Associations, Inc., Private Truck Council of America, Inc., Private Carrier Conference, Inc., of American Trucking Associations, Inc., and the Private Truck Owners Conference of the Empire State Highway Transportation Association, Inc.

Rail carriers: The Pennsylvania Railroad Company and the Chicago, Rock Island and Pacific Railroad Company.

Manufacturers: Western Electric Company, Incorporated, Bethlehem Steel Company, Great Atlantic and Pacific Tea Company, Inc., Ford Motor Company, Montgomery Ward & Co., Incorporated, and Royal Crown Cola Co.

Manufacturer associations: American Retail Federation and the National Industrial Traffic League.

State commissions: California, Missouri, Maine, Virginia, North Carolina, New York, New Mexico, and Connecticut.

Others: Lelland M. Cowan and the National Association of Railroad and Utilities Commissioners.